VEERIAN T LATCHMANEN

v.

PP

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[CRIMINAL APPEAL NO: 42-04-01]
1 SEPTEMBER 2001

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Consideration of principles in Tukiran Taib v. PP - Whether must be reviewed - Serious crimes involving young offenders - Whether should be spared custodial sentence - Age of Majority Act 1971*

CRIMINAL PROCEDURE: *Revision - Plea of guilty - Whether a mitigating factor for lesser punishment - Whether appellant a first and youthful offender - Whether age factor may be used as mitigating factor to escape custodial sentence - Element of public interest*

CRIMINAL PROCEDURE: *Sentence - Powers of appellate court - When may appellate court interfere with sentence imposed by lower court - Whether lower court exercised discretion in sentencing correctly - Whether reduction in sentence justified*

WORDS & PHRASES: *"Juvenile offenders" - Young offenders - Youthful offenders - Child offenders - Criminal Procedure Code - Juvenile Courts Act 1947 - Definition and classification - Whether terms may be used interchangeably*

The appellant had pleaded guilty to a charge of voluntarily causing hurt under s. 324 of the Penal Code at the Sessions Court, Taiping. Upon being found guilty, he was sentenced to 13 months' imprisonment. The appellant was 20 years old at the time of commission of the offence and 21 years old at the time of sentencing. He subsequently filed an appeal asking this court to revise the sentence. The appellant submitted that he had saved the court's time by pleading guilty and that he was a first and youthful offender. He also relied on the ruling in *Tukiran Taib* in support of his submission.

Held:

[1] The principle in *Tukiran Taib* must be reviewed after taking into account the nature of the offence committed by the appellant, the Age of Majority Act 1971, and the increase in crime rate committed by young offenders between the ages of 18-21 years.

[1a] Young offenders who commit serious crimes involving violence should not be spared the sentence of imprisonment and be allowed to hide under the cover that they are young offenders and hence, should be spared the custodial sentence.

[1b] These observations however, should not be misconstrued as intending to apply generally to all cases involving young offenders. Each case is to be considered based on its own special facts and circumstances.

[2] If age is not a barrier to commit serious offences by young offenders, then the age factor cannot be used as a strong mitigating factor to escape custodial sentence. The offender must be prepared to face and suffer the penalties as prescribed by law.

[3] There must be a distinction drawn between "juvenile offenders", "young offenders", "youthful offenders" and "child offenders". These terms cannot be used interchangeably as the appellant in this instant appeal is not a "youthful offender" as contended by the appellant. These terms are defined and classified in the Criminal Procedure Code and Juvenile Courts Act 1947 respectively.

[4] Power to impose sentence is a judicial discretion. Unless and until the lower courts have erred in principle or that the sentence was manifestly excessive or manifestly low, the High Court sitting in an appellate capacity ought not to disturb or interfere with that discretion.

[5] The learned Sessions Court judge had exercised her discretion correctly. Furthermore, the severity of the offence committed by the appellant outweighed his plea in mitigation. Accordingly, there was no need to interfere with the sentence passed by the Sessions Court.

[Appeal against sentence dismissed.]

Case(s) referred to:
Abu Bakar Alif v. R [1953] 19 MLJ 19 ***(foll)***
Ang Chai Eng v. PP [2000] 1 CLJ 213 ***(refd)***
Cave v. Mills 7H & N HNN 913 ***(refd)***
Ismail Rasid v. PP [1999] 4 CLJ 402 ***(refd)***
Itan Kah Eng v. PP [1965] 2 MLJ 272 ***(refd)***
Karpal Singh Ram Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 ***(refd)***
Lian Kian Boon v. PP [1990] 2 CLJ 799; [1990] 2 CLJ (Rep) 350 ***(refd)***
Lim Yoon Fah v. PP [1971] 1 MLJ 272 ***(refd)***
Lim Yoon Fah v. PP [1971] 1 MLJ 37 ***(dist)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] 13 MLJ 130 ***(foll)***

Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 ***(refd)***
Mohd Dalhar Alhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 ***(refd)***
PP v. Doraigunaraja Krishnan [1993] 3 CLJ 664 ***(refd)***
PP v. Jafri Mohamed Tahir (High Court, Ipoh) Perbicaraan Jenayah Perak No: 44-10-98 ***(refd)***
PP v. Jang Boonadisai (High Court, Alor Setar) Kedah Criminal Trial No: 47-5-92 ***(refd)***
PP v. Leonard Glenn Francis [1989] 2 MLJ 158 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(foll)***
PP v. Low Kok Wai [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 ***(refd)***
PP v. Nazarudin Ahmad & Ors [1993] 2 CLJ 543 ***(refd)***
PP v. Ravindra N Rethinam & Ors [1992] 4 CLJ 2043; [1992] 3 CLJ (Rep) 426 ***(refd)***
PP v. Sharithan Pachemuthu [2000] 5 CLJ 15 ***(refd)***
PP v. Wong Chak Heng [1985] 1 MLJ 457 ***(refd)***
PP v. Yee Tham Soon [2000] 7 CLJ 519 ***(foll)***
PP v. Yeong Yin Choy [1976] 2 MLJ 267 ***(dist)***
R v. James Peter Curran [1973] Court Of Appeal (Criminal Division) 945 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Re Radha Krishna Naidu [1962] 28 MLJ 130 ***(refd)***
Rex v. Lec De Cruz [1935] MLJ 1 ***(refd)***
Rex v. Teo Cheng Lian Rex v. Leck Kwee Ser [1949] 15 MLJ 170 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Sia Yik Hung v. PP [1997] 4 CLJ Supp 503 ***(refd)***
Sures Perumal v. PP [2001] 2 CLJ 88 ***(dist)***
Tan Eng Poh v. Regina [1963] 29 MLJ 126 ***(refd)***
Teh Yew Whatt v. PP [1958] 24 MLJ 171 ***(refd)***
Teo Siew Peng & Ors v. PP [1985] 2 MLJ 125 ***(refd)***
Theresa Lim Chin Chin & Ors v. Inspector General Of Police [1988] 1 MLJ 293 ***(refd)***
Tukiran Taib v. PP [1955] 21 MLJ 24 ***(dist)***
Vennel & Ors v. PP [1985] 1 MLJ 459 ***(refd)***
Wong Siak Fon v. PP [1972] 1 MLJ 203 ***(refd)***
Yong Pak Yong v. PP [1959] 25 MLJ 176 ***(refd)***
Yusmarin Shamsuddin v. PP [1999] 4 CLJ 391 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(refd)***

Legislation referred to:

Age of Majority Act 1971, ss. 2, 4
Criminal Procedure Code, ss. 2(1), 293(1), 294
Dangerous Drugs Act 1952, ss. 6, 39A(2)
Drugs Dependants (Treatment And Rehabilitation) Act 1983, s. 6(3)
Juvenile Courts Act 1947, ss. 2, 12
Penal Code, ss. 82, 304(a), (b), 324, 365, 379, 392, 397, 394

For the appellant - V Sakthivel; M/s Azman Tahir & Co
For the respondent - Abdul Hakim Amir Ahmad Nordin DPP

Reported by Raja Vishnu Sivarajah

JUDGMENT

VT Singham JC:

This is an appeal against the sentence imposed by the Sessions Court, Taiping on 8 May 2001 against the appellant, aged 20 years and 5 months at the time of the commission of the offence on 17 September 1999 and aged 21 years and 10 months at the time when he was sentenced on 8 May 2001. The appellant pleaded guilty at the Sessions Court, Taiping on a charge under s. 324 of the Penal Code for voluntarily causing hurt to one, Santana Mary d/o Peter Anthony aged 53 years by using a piece of wood. The appellant was found guilty and sentenced to 13 months imprisonment to take effect from the date of sentence on 8 May 2001. He was represented by counsel, Mr. Kulwinder Singh at the Sessions Court, Taiping. As the appellant was dissatisfied with the sentence, he filed a notice of appeal against the sentence. Hence, this appeal.

Prior to the appellant having pleaded guilty to the offence under s. 324 of the Penal Code, the appellant was charged for two offences, namely:

(a) in attempting to commit robbery, voluntarily caused hurt to Santana Mary d/o Peter Anthony, an offence under s. 394 of the Penal Code which provides punishment with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to whipping;

(b) voluntarily caused hurt, an offence under s. 324 of the Penal Code which provides punishment with imprisonment for a term which may extend to three years, or with fine, or with whipping or with any two of such punishments.

The learned Sessions Court judge before passing sentence on the offence under s. 324 of the Penal Code had called for the probation report and took into account the following factors. (See *Tukiran Taib v. PP* [1955] MLJ 24, *Teh Yew Whatt v. PP* [1958] MLJ 171, *Itan Kah Eng v. PP* [1965] 2 MLJ 272, *Lim Yoon Fah v. PP* [1971] 1 MLJ 272 and, *Lian Kian Boon v. PP* [1990] 2 CLJ 799; [1990] 2 CLJ (Rep) 350:

(a) the plea of guilt;

(b) the facts of the case;

(c) the nature of the offence;

(d) the probation report;

(e) the appellant was young and a first offender;

(f) the mitigating factors.

At the High Court, the appellant's new counsel, Mr. V. Sakthivel at the start of the appeal applied to the court to exercise its revisionary powers to quash the conviction on the ground that the conviction was bad in law because of the following reasons:

(a) it is not clear whether the nature and consequences of the plea of the appellant was explained to him;

(b) the charge under s. 324 did not state that the injury to the victim was caused by a piece of wood;

(c) it is not clear whether the probation report was read to the appellant although it is stated in the notes of proceedings that the appellant had admitted to the probation report.

In urging this court to exercise its revisionary powers, the learned counsel for the appellant relied on *Sures Perumal v. PP* [2001] 2 CLJ 88, a decision of this court.

In disallowing the oral application of the appellant to revise the decision of the learned Sessions Court judge on the conviction, this court distinguished the facts in *Sures Perumal v. PP* [2001] 2 CLJ 88. In that case, the appellant who was unrepresented pleaded guilty to an offence under s. 6(3) of the Drugs Dependants (Treatment And Rehabilitation) Act 1983 and the subject matter of the alleged dangerous drug was Cannabinoid which is not a dangerous drug under the first schedule of the Dangerous Drugs Act 1952. Consequently, the charge against the appellant did not disclose an offence under the law and this court on the application of the appellant's counsel exercised its revisionary powers to quash the conviction. Whereas in the instant appeal, the nature of the complaint by the appellant is not similar to the grounds stated in *Sures Perumal v. PP* [2001] 2 CLJ 88 and the complaint raised by the learned counsel is contrary to the notes of proceedings recorded and as contained in the Record of Appeal. Therefore, this court declined to exercise its revisionary powers as the grounds advanced on behalf of the appellant did not justify any interference with the conviction and there was no irregularity which had occasioned a failure of justice. (See *Wong Siak Fon v. PP* [1972] 1 MLJ 203 at 205, *Re Radha Krishna Naidu* [1962] 28 MLJ 130 and *Mohd Dalhar Alhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209).

However, it is the observation of this court that it will be a proper practice and desirable if a notice of motion is filed in court with an affidavit in support where a person is aggrieved by a decision of the lower court and wishes to move the High Court to exercise its revisionary powers as a result of his plea of guilt to a charge which does not disclose a recognised offence under the law and/or if there is some irregularity in the decision of the lower court which had occasioned a miscarriage of justice. This practice and procedure will no doubt enable this court to act on evidence as contained in the affidavit instead of a bare statement of counsel from the bar table and it would also give an opportunity to the learned deputy public prosecutor to seek clarification and address the court on the complaints raised in the affidavit so that this court could come to a just decision. (See *Karpal Singh Ram Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183). Nevertheless this remedy is still subject to s. 305 of the Criminal Procedure Code.

The learned counsel for the appellant then proceeded to address the court on the sentence. He informed the court that the petition of appeal was prepared and filed by the previous counsel and that he was retained to act for the appellant only on Saturday, 19 July 2001. He did not apply for an adjournment and was prepared to proceed on with the appeal.

The learned counsel for the appellant submitted that the appellant was a first and youthful offender and that he should not be sent to prison as he will be forced to mix with the other adult offenders which will not be good for the appellant as he was a youthful offender. He complained that the learned Sessions Court judge had failed to take into account that the appellant had saved the court's time by pleading guilty and that the appellant was a first and youthful offender. He asked this court to revise the sentence. He referred to the following cases in support of his submission:

(1) *Tan Eng Poh v. Regina* [1963] 29 MLJ 126

(2) *Tukiran Taib v. PP* [1955] 21 MLJ 24

(3) *Lim Yoon Fah v. PP* [1971] 1 MLJ 37

(4) *PP v. Yeong Yin Choy* [1976] 2 MLJ 267

(5) *Vennel & Ors v. PP* [1985] 1 MLJ 459

The learned counsel for the appellant stressed on the case of *Tukiran Taib v. PP* [1955] 21 MLJ 24 and submitted that the appellant being a first and youthful offender, he should therefore be kept out of prison. To a question by this court as to what is the appropriate sentence on the facts in this case, counsel replied that three months imprisonment "would suffice." To a further

question by this court, what his client, the appellant was doing in the victim's house at 2am. when the appellant should have been sleeping in his own house at that time, learned counsel for the appellant replied "I cannot answer that question". The learned counsel for the appellant did not apply to the court for the appellant to be bound over or to impose a fine nor was any application made for the parents or any family member to come forward to give an assurance to the court or to ensure that the appellant will not commit any kind of criminal offence or be involved in any criminal activity in the future.

On the other hand, the learned deputy public prosecutor in opposing the appeal urged this court to maintain the sentence of 13 months imprisonment. He submitted as follows:

(i) the learned Sessions Court judge had taken into account the facts of the case, the probation report, the mitigating factors, the appellant's plea of guilt to the charge and that he was a young first offender;

(ii) The prosecution did not proceed with the charge under s. 394 of the Penal Code when the appellant pleaded guilty to the charge under s. 324 of the Penal Code;

(iii) there have been an increase in cases of crime recently being committed by young offenders which includes rape, murder, causing grievous hurt and offences involving violence and that this court should consider the public interest. The prosecution in the lower court did not press on the sentence but urged the court to impose an appropriate sentence. It was the Sessions Court judge who exercised her discretion to sentence the appellant to imprisonment after having considered the entire set of facts and the plea in mitigation in the case;

(iv) the appellant entered the victim's house in the early hours of the morning and when the victim woke up, he voluntarily caused hurt to the victim who is an old lady, aged 53 years;

(v) the appellant was 20 years and 5 months old at the time of the commission of the offence and 21 years and 10 months old at the time when he was sentenced by the Sessions Court;

(vi) he referred to the medical report dated 14 February 2000 on the victim issued by the Hospital Taiping which reads as follows:

> The above patient was allegedly assaulted.
>
> She sustained loss of consciousness and laceration wound over the forehead.

Clinical examination revealed that she was stable and glasgow coma scale of 15/15.

Laceration wound:

1. Forehead – 7 cm long

2. Right pinna: 3 cm long

Diagnosis:

Assaulted with cerebral concussion and laceration wound of forehead. Toilet and suturing done under local anaesthesia.

The learned deputy public prosecutor once again urged this court not to disturb the sentence as the learned Sessions Court judge did not act in contrary to the sentencing principles.

In reply, the learned counsel for the appellant urged this court to give a chance to the appellant as he has lost his job as a lorry attendant when he was sentenced to imprisonment.

On hearing both the learned counsel for the appellant and the learned deputy public prosecutor, this court dismissed the appeal for a reduction in the sentence.

It has been stated as early as in 1935 that the appellate court will not interfere with a sentence passed by the lower courts unless the judge has proceeded on wrong principle in exercise of his discretion or given undue weight to some of the evidence (see *Rex v. Lec De Cruz* [1935] MLJ 1, *Rex v. Teo Cheng Lian. Rex v. Leck Kwee Ser* [1949] 15 MLJ 170 at 171).

Having considered the above mentioned two cases, this court now wish to refer to *Tukiran Taib v. PP* [1955] 21 MLJ 24. In that case, the appellant, Tukiran who was 17 years of age, a juvenile had pleaded guilty to an offence of theft of coconuts under s. 379 of the Penal Code. He was sentenced to four months imprisonment by the Magistrate's Court, Tanjung Karang. On revision, Bellamy J found that the accused committed theft of the coconuts because he had no "wang" (money) for expenses and the learned magistrate did not appear to have taken these factors into consideration. The sentence of four months' imprisonment was quashed by the High Court and the accused was ordered to be committed for three years to the Henry Gurney School in Teluk Mas. In that case, the learned magistrate did not record the facts of the case. In respect of that case, it is useful to set out some of the observations made by His Lordship Bellamy J so as to distinguish the facts of that case with the facts in the instant appeal. In *Tukiran Taib v. PP* [1955] 21 MLJ 24, His Lordship Bellamy J said:

> Everybody knows how difficult it is to catch the thieves, and there can be not the smallest room for doubt that this evil must be stamped out and, if it is necessary, by heavy prison sentences. In the circumstances of this case, I do not consider a sentence of four months' imprisonment to be in the least bit excessive and, if the accused was over 21 years old, I would not interfere with this sentence.

However, the facts of the instant appeal as contained in the record of appeal discloses that the appellant had not only entered the victim's house while the victim was asleep but voluntarily caused hurt to the victim with a piece of wood when she woke up on seeing the appellant's presence in her house. The victim suffered serious injuries on her head as in the medical report as referred above. It is important to note that had the victim not been sent to the hospital immediately, the seriousness of the injuries could have caused severe damage to the victim's head and as a consequence it could have led to other serious consequences which could probably even have affected her brain if she was not attended to immediately. Rampancy of this nature of the offence still continues and those who commit such offences should be prepared to accept the punishment prescribed by law (per Nik Hashim Bin Nik Ab Rahman J "… since he was so brave to commit the offence, he must also be brave to suffer the penalties as prescribed by law …", see *PP v. Sharithan Pachemuthu* [2000] 5 CLJ 15).

Thus, this court is of the view that the time is ripe for a rethink of the general principle in Tukiran which states that "… It has been stressed by this court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible …". This principle must be reviewed after taking into account the nature of the offence committed by the appellant, the Age of Majority Act 1971, and the increase in the crime rate committed by young offenders between the ages of 18 years - 21 years notwithstanding the serious crimes committed by juvenile offenders. This court is of the view that young offenders who commit serious crimes involving violence should not be spared the sentence of imprisonment and be allowed to hide under the cover that they are young offenders and hence they should be spared the custodial sentence.

However, it is important to make it clear that the observation by this court that young offenders should not be spared the custodial sentence is not intended as a general application and should perhaps be limited to serious offences such as rape, outraging modesty, robbery, house breaking and voluntarily causing grievous hurt. Nevertheless, each case will depend on the nature of the offence, the facts of the case, the plea of guilt, the co-operation extended by the offender to the police, the facts contained in the probation report, the circumstances in which the offence was committed, the age, the family

background and antecedents of the offender and if the crime involves violence, provocation if any, the character and the plea in mitigation put forward on his behalf and the opposing views put forward on behalf of the prosecution (see *Mohamed Jusoh Abdullah & Anor v. PP* [1947] 13 MLJ 130). Therefore, these observations by this court should not be misconstrued as intending to have blanket application or applying to all cases involving young offenders. Each case should be considered based on its own special facts and circumstances. On the other hand, it cannot be denied that in the year 1955 or 1950s, the occupants of a dwelling house could sleep safely and peacefully with the windows wide open unlike presently, where it is no longer safe even to sleep with the windows and doors closed and locked as the offenders are so daring even to enter into dwelling houses and business premises to the extent of breaking open the windows and doors with the intention not only to rob but in the course of the robbery, they are prepared to inflict injuries on the occupants of the house when they are confronted. It has been said time and time again by our superior courts that the extent and seriousness of the offence committed, the guilty persons' antecedents and the public interest factor are factors *inter alia* which the court ought to take into consideration before a sentence is passed on a person who is found guilty (see *Yusmarin Shamsuddin v. PP* [1999] 4 CLJ 391).

It is also important to consider the case of *Abu Bakar Alif v. R* [1953] 19 MLJ 19, wherein His Lordship Spenser Wilkinson J said:

> (2) the first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore, fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the Court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person.

It is also useful to refer to the principles enunciated in the following cases which have to be considered when sentencing an offender who has pleaded guilty.

In *Sau Soo Kim v. PP* [1975] 2 MLJ 134 at p. 137, His Lordship Lee Hun Hoe CJ (Borneo) said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

In *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209, His Lordship Mohd Azmi SCJ said:

> A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence.

It also needs no reminder that in all cases that comes before the lower courts for sentencing upon a plea of guilty, there must be a true balance in the scale of justice between the facts presented by the prosecution and the plea in mitigation put forward on behalf of an accused person (see *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270, *PP v. Doraigunaraja Krishnan* [1993] 3 CLJ 664).

In *Lim Yoon Fah v. PP* [1971] 1 MLJ 37, the case cited by the learned counsel for the appellant has to be distinguished on the facts and the plea in mitigation observed by the appellate court. In that case, the appellant was 20 years 7 months old at the time of the offence. He pleaded guilty to an offence under ss. 392 and 397 of the Penal Code. The appellant was sentenced to 13 months imprisonment and four strokes of the rotan by the president of the Sessions Court. On appeal, His Lordship Chang Min Tat J (as His Lordship then was) in setting aside the sentence of imprisonment said:

> The learned president before assessing the appropriate sentence to meet the circumstances of this case and the nature of the offence, on being told that the appellant was 20 years 7 months old at the time of the offence, called for a probation report. In so doing, the learned president was acting, if I may say so, very correctly but beyond noting his age and that the accused was a first offender, *he regrettably did not proceed to consider the other contents of the report. They show quite clearly that the accused came from a decent family, with parents who were genuinely interested in his welfare and the welfare of his other brothers and sisters. The report also discloses that the accused had a certain dexterity with his hands and was training satisfactorily as a motor-car mechanic. From his investigations, the probation officer reported that the appellant was obviously misled by his companion in crime*. (emphasis added).
>
> The learned president stressed the public interest, in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged by a deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not sufficiently considered the full meaning of that passage from Hilbery J. in *R v. Ball* which he quoted and is now reproduced:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of

> punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on his supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

In *PP v. Yeong Yin Choy* [1976] 2 MLJ 267, the case cited by the learned counsel for the appellant, His Lordship Abdoolcader J (as he then was) did not interfere with the order of binding over imposed by the learned magistrate on the particular facts of that case which favoured the respondent.

In *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13, Raja Azlan Shah J as His Royal Highness (as His Royal Highness then was), now HRH the Sultan of Perak said:

> Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative penalties of death or imprisonment for life under section 39B of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by death cannot and should not be made functionally operative and exercised and applied *proprio vigore* if the circumstances and facts of the case so warrant, justify, require and perhaps even demand.
>
> Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing upsurgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less then engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred, that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist

and have the misfortune of being apprehended, should know they are in for the punishment prescribed by law to fit the crime.

In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, His Lordship Hashim Yeop A. Sani J (as His Lordship then was) said:

> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.
>
> Having regard to the background report on the accused and his plea in mitigation that he was in fact peddling drugs although he said he was forced to do so. I consider that the order to bind him over with his mother as the surety is clearly and manifestly inadequate not only considering the nature of the offence and the circumstances under which it was committed but also considering that such bond is ineffective under the circumstances as an assurance of future good conduct.
>
> Considering the background of the accused in the instant case fining him would also be ineffective as also a long prison sentence would be inappropriate. Therefore it is my considered view that in this case a sentence of imprisonment of six months will be appropriate in the hope that "his memory of the clanging of prison gates" will keep him from this crime in the future. The sentence of the Special President is accordingly substituted.

In *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268, His Lordship Mohamed Dzaiddin J (as he then was) presently the Rt Hon Chief Justice of Malaysia said:

> It is a principle of sentencing that whenever possible the Court should take into account as a mitigating factor the fact that the Accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the Accused. [See: *Archbald*, 42nd Ed. Para. 4-480 citing *R. v. Davis* [1980] 2 Cr. App. R. (S) 168.]

In *PP v. Ravindra N. Rethinam & Ors* [1992] 4 CLJ 2043 at 2046; [1992] 3 CLJ (Rep) 426, His Lordship Dato' Dr Visu Sinnadurai J said:

> It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial. This rule however, is not a strict rule as the Courts may, in exercise of their discretion, in exceptional cases, refuse to grant any discount: see for example *PP v. Leo Say & 2 Ors.* [1985] 2 CLJ 155 (HC).

The other relevant comment is made by the well known writer, Stockdale in *The Court and the Offender* (1967) at p. 202:

> The mitigation speech must be recognised as being one of the most important functions of the advocate, and should not be regarded as something which prevents the court from getting on with its 'real' work, namely the trial of pleas of not guilty. The advocate should equip himself properly for his double task of representing his client, and of helping the court to come to the conclusion … .

In *Teo Siew Peng & Ors v. PP* [1985] 2 MLJ 125 at p. 127, His Lordship Tan Chiaw Thong J said:

> The learned president in his sentence emphasised that the public interest must be taken into account, and he rightly stated that the criminal law is enforced not only to punish the persons concerned but to prevent crimes. He also went on to say that the court must consider the interest of the accused as well as the victim or victims concerned. It is clear from the sentence of the lower court that emphasis was placed more on the deterrent factor than on the reformative factor concerned in the consideration of the imposition of sentence.
>
> However, it is also established that in dealing with the individual offender the circumstances of the offence and the character and antecedents of the offender should also be taken into account. Apart from briefly mentioning that the interest of the accused should be taken into account in the sentence, the lower court does not appear, in my view, to have dealt fully with the character and antecedents of the appellants and, as earlier stated, with the reformative factor involved in sentencing.

In *R v. James Peter Curran* [1973] Court Of Appeal (Criminal Division) 945, Justice, MacKenna J said:

> As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence, and imposed, as this sentence was, for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence; of what sentence is needed to teach this particular offender a lesson which he has not learnt from the lighter sentences which he has previously received.

In *PP v. Nazarudin Ahmad & Ors* [1993] 2 CLJ 543 at 549, His Lordship Dato' Dr. Visu Sinnadurai J said:

> In the present case, this Court is of the view that as the offence committed by the third accused cannot be classified as one of 'trivial nature', ss. 173A or 294 of the Criminal Procedure Code cannot be invoked.

I have also been mindful of the following sentencing principle as stated by the leading writer on sentencing, Thomas in his book, on *Principles of Sentencing*, 1st edition, relating to public interest and the young offender. He points out as follows:

> In the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen. The difficult task of the Court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration.

However, **considering the gravity of the offence for which the third accused had pleaded guilty to, I am of the view that a prison sentence is the most appropriate sentence under the circumstances**. In so arriving at this conclusion that a prison term is justified, I have been guided by some earlier decisions: *PP v. Teh Ah Cheng* [1976] 2 MLJ 186; *PP v. Loo Chan Fatt* [1976] 2 MLJ 256; and *PP v. Francis* [1989] 2 MLJ 158. (emphasis added)

In an unreported case *vide* Kedah Criminal Trial No: 47-5-92 *PP v. Jang Boonadisai* (High Court, Alor Setar), the accused pleaded guilty to an amended charge for possession of dangerous drugs to wit 39,107.3 grammes of raw opium under s. 6 of the Dangerous Drugs Act 1952, an offence punishable under s. 39A(2) of the same Act. His Lordship Mohd Ariff Bin Dato' Haji Othman J in imposing a sentence of seven years imprisonment together with a mandatory ten strokes of rotan said "... the availability of an effective defence to the charge if the accused were to claim trial to the charge (as in the present case ...) would be a powerful mitigating factor."

In another unreported case *vide* Perbicaraan Jenayah Perak No: 44-10-98 *PP v. Jafri Mohamed Tahir* (High Court, Ipoh), the accused pleaded guilty to an amended charge of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. His Lordship Dato' Sulaiman B Hashim J bound over the accused under s. 294 of the Criminal Procedure Code with two sureties in the sum of RM10,000 for three years. In his grounds of judgment, His Lordship said "with respect I think it is doubtful whether or not the offence committed by the accused falls under s. 304(a) of the Penal Code (Act 574 Revised 1997)" and His Lordship exercised his powers under s. 294 of the Criminal Procedure Code and found that the offence committed by the accused fell under s. 304(b) of the Penal Code and convicted the accused under s. 304(b) of the Penal Code. In his judgment on sentence His Lordship said that the facts presented by the prosecution had shown extenuating circumstances which resulted in the accused committing the offence.

On the other hand, in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at 446, His Lordship Augustine Paul JC (as he then was) said:

> I must add that this reduction principle should not be slavishly applied in every case where an accused person pleads guilty. It is superfluous to state that it warrants consideration only if, in the first instance, it is desired to impose a custodial sentence. Be that as it may, this rule is not a strict rule as the Court may, in the exercise of its discretion, refuse to grant any discount in appropriate cases (see *Lee Say & Ors. v. PP* [1985] 2 CLJ 155). (see *PP v. Tia Ah Leng* [2000] 5 CLJ 614)

In *Ismail Rasid v. PP* [1999] 4 CLJ 402, the appellant was convicted on his own plea of guilty to two charges of rape against his 14 year old daughter. He was sentenced to 14 years imprisonment and three strokes of the rotan on each of the charges by the learned Sessions Court judge and the sentence of imprisonment was ordered to run from the date of his arrest, i.e. concurrently. On appeal by the accused, the sentence was enhanced to 20 years imprisonment and five strokes of the rotan for each of the two charges. This court wishes to make it clear that the appellant Ismail Bin Rasid in that case was an adult and not a youthful offender. In enhancing the sentence, His Lordship KN Segara J said:

> Judicial officers, too, should not labour under the notion that in determining an appropriate sentence, a "discount" should automatically be given in all cases upon a plea of guilty, without prior exercise of judicial discretion to all facts and circumstances relating to the offence, the offender, the victim, the interest of the public, as well as the Malaysian culture, social behaviour and propriety.
>
> This appeal before me is a classic example of a case where no "discount" should be given to the appellant for having pleaded guilty. The sentence must reflect Malaysian society's abhorrence to crimes of this nature.

In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, His Lordship Hashim Yeop A Sani J (as he then was) said:

> Needless to say, the court should not simply jump at exercising the powers under section 173A of the Criminal Procedure Code simply because the accused is a youthful offender and he says he regrets what he has done. It would be useful, I think, if I repeat here what was said by the late Sharma J. in *Re Badri bin Abas* (with which I wholeheartedly agree) as a word of caution on the exercise of discretion under section 173A of the Criminal Procedure Code in that an exercise of discretion under this section requires a considerable sense of responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. That section is not meant to be applied indiscriminately to all first offenders who say they regret what they have done and ask for leniency.

In *Yong Pak Yong v. PP* [1959] 25 MLJ 176, His Lordship Good J said:

> The second observation which I would, with the greatest respect, make on the Court of Appeal judgment is that while the learned Chief Justice speaks of the modern tendency of penal procedure and reform being against the imposition of corporal punishment on adults, the kind of people whom I have in mind – when I speak of this particular class of cases – are not adults at all. They are youths, teenagers, or young men in their early twenties who have never developed an adult mentality, who have the minds of small boys and the addiction of small boys to gangsterism, and the tendency of small boys to bullying; but they are much more dangerous and cruel and savage than small boys because they have the means, which they do not hesitate to use, of inflicting grievous hurt, and even death, upon their victims. I say all that because it is perfectly clear from the evidence in this case that the appellant is an active member of a secret society.

In *PP v. Wong Chak Heng* [1985] 1 MLJ 457, the accused pleaded guilty to two cases of theft *viz*, the theft of the spare tyre and sports rim of two m/cars. At the time of committing the offences, the accused was 23 years old and had no previous conviction and he was sentenced to a fine of $200 and $300 respectively. The public prosecutor appealed against the inadequacy of the sentence imposed on the accused for both offences. In enhancing the sentence, His Lordship NH Chan J (as he then was) said "the public are entitled to be protected against such offenders. In the opinion of this court, they are not likely to be protected if lenient sentences are passed. Offenders are not likely to be discouraged by sentences which do not involve loss of liberty."

> If an immediate prison sentence is necessary, as I believe to be the case here, then it should be consistent with the duty to protect the interests of the public and to punish and deter the criminal. To use the words of Lawton L.J. in *Reg v. Davies*:
>
> > the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct.
>
> In the instant case, Wong is a first offender. The sentencing court must realise, that when one speaks of deterrence that there are two aspects of deterrence. This is how it was put by Lawton L.J. in *Reg. v. Sargeant*:
>
> > There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders.

This court is of the view that if age is not a barrier to commit serious offences by young offenders, like house breaking, causing grievous hurt, robbery, outraging modesty, rape, murder and extortion then certainly the age factor

cannot be used as a barrier or as a strong mitigating factor to escape custodial sentence but the offender must be prepared to face and suffer the penalties as prescribed by law (see *PP v. Yee Tham Soon* [2000] 7 CLJ 519). Everybody in this country is entitled to sleep in his home safely and peacefully and without any undue fear of being hurt or robbed by intruders and anyone who causes breach of this safety whether he be an adult or a young offender should be severely dealt with by the courts when sentencing so as to show its abhorrence.

Be that as it may, it is important to observe that there must be a distinction drawn between juvenile offenders, young offenders, youthful offenders and child offenders and this terms cannot be used interchangeably as the appellant in the instant appeal is not a youthful offender as contended by the learned counsel for the appellant. A "youthful offender" is defined under s. 2(1) of the Criminal Procedure Code to "include any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of ten and under the age of sixteen years in the opinion of the court before which such child is convicted" and they are dealt with punishment provided under the Penal Code or by any law for the time being in force.

A Juvenile is defined in s. 2 of the Juvenile Courts Act 1947 to mean "a person who has attained the age of criminal responsibility prescribed in s. 82 of the Penal Code and is under the age of eighteen" and the punishment for such juvenile offences is provided under the Juvenile Courts Act 1947 and the type of sentences are stipulated under s. 12 of the Juvenile Courts Act 1947 (see *Sia Yik Hung v. PP* [1997] 4 CLJ Supp 503) and repealed – [see s. 130 of the Child Act 2001 (Act 611)] but this Child Act 2001 is not in force as yet.

Powers of a Juvenile Court on proof of offence.

(1) Where a Juvenile Court is satisfied that an offence has been proved, the Court shall, in addition to any other powers exercisable by virtue of this Act or any other law for the time being in force, have power:

(a) to admonish and discharge the offender;

(b) to discharge the offender upon his entering into a bond to be of good behaviour and to comply with such order as may be imposed;

(c) to commit the offender to the care of a relative or other fit person;

(d) to order his parent or guardian to execute a bond to exercise proper care and guardianship;

(e) without making any other order, or in addition to an order under paragraph (c) or (d), to make a probation order under section 21;

(f) to order the offender to be sent to an approved school or Henry Gurney school;

(g) to order the offender to pay a fine, compensation or costs; and

(h) where the offender is a young person and the offence is punishable with imprisonment the Court may, subject to section 15 (2), impose upon him any term of imprisonment which could be awarded by a Sessions Court or, if the Court considers that its powers are inadequate, commit him to the High Court for sentence.

(2) An order under subsection (1) (d) may be made against a parent or guardian who, having been required to attend, has failed to do so; but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity to be heard.

(3) The words "conviction" and "sentence" shall not be used in relation to juveniles dealt with by the Juvenile Court and any reference in any written law to a person convicted and a sentence shall, in the case of a juvenile, be construed as a finding of guilt or an order made upon a finding of guilt, as the case may be.

Whereas "young offenders" can be classified as between the ages of 18 and 21 although the Juvenile Courts Act 1947 defines "young persons" to mean a person who has attained the age of 14 years and is under the age of 18. Young offenders who are between the ages 18 - 21 years are dealt with when it comes to sentencing to be sent to an advanced approved school if it will be more beneficial to them but subject to the facts of each case, the nature of the offence, the background of the offender and the plea in mitigation.

Whereas a "youthful offender" is defined under s. 2(1) of the Criminal Procedure Code to "include any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of ten and under the age of sixteen years in the opinion of the court before which such child is convicted" and they are dealt with punishment provided under the Penal Code or by any law for the time being in force. Youthful offenders who are convicted before any criminal court by an offence punishable by fine or imprisonment could also be dealt with under s. 293(1) of the Criminal Procedure Code instead of awarding any term of imprisonment in default of payment of a fine or passing a sentence of imprisonment or to be dealt with in the manner provided by the Juvenile Courts Act 1947.

Whereas "child" means a person under the age of 14 (see s. 2(1) of the Juvenile Courts Act 1947). On the other hand 'child' means a person under the age of 18 years (see s. 2 of the Child Act 2001) which Act 611 received the royal assent on 15 February 2001 and gazetted on 1 March 2001 but still not in force as yet. In relation to criminal proceedings "a child" means a person who has attained the age of criminal responsibility as prescribed in s. 82 of the Penal Code. Section 82 of the Penal Code states that:

> 82. Act of a child under 10 years of age.
>
> Nothing is an offence which is done by a child under ten years of age.

In *Teh Yew Whatt v. PP* [1958] 24 MLJ 171, the learned president of the sessions court sentenced the appellant under the age of 21 years to 3 years' imprisonment on a charge under s. 365 of the Penal Code without calling for a probation officer's report on the background of the appellant. On appeal against sentence, His Lordship Smith J called for a probation officer's report and from it he was satisfied that the proper order in the case was for the appellant to be detained in a Henry Gurney School until he attained the age of 21 years. Accordingly, the sentence of three years' imprisonment was set aside and the appellant was ordered to be detained in a Henry Gurney School until he attained the age of 21 years. In the instant appeal, the learned Sessions Court judge called for a probation officer's report and had considered the report. Thus, it cannot be said that the learned Sessions Court judge had failed to take into consideration all the relevant facts and the background of the appellant before imposing the sentence.

Be that as it may, it is important at this stage to look at the Age of Majority Act 1971 which came into effect on 30 April 1971 in considering the appropriate sentence for young offender. In so far as the general principle on sentencing for young offenders, the Age of Majority Act 1971 has not been considered by the lower courts when imposing sentence on offenders between the ages 18 years - 21 years. At this point, it must be borne in mind that the case of *Tukiran* was decided before the Age of Majority Act 1971 came into force and *Tukiran* was decided 46 years ago. By the repeal of the Age of Majority Act 1961, the age of majority has been brought down from 21 years to 18 years by the Age of Majority Act 1971. Section 2 of the Age of Majority Act 1971 states as follows:

> 2. Subject to the provisions of section 4, the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority.

Section 4 of the Age of Majority Act 1971 states as follows:

> 4. Nothing in this Act shall affect:
>
> (a) the capacity of any person to act in the following matters, namely, marriage, divorce, dower and adoption;
>
> (b) the religion and religious rites and usages of any class of persons within Malaysia;
>
> (c) any provision in any other written law contained fixing the age of majority for the purposes of that written law.

In the circumstances, this court is of the respectful view that the general principle in *Tukiran* cannot presently be maintained and ought to be reviewed for several reasons amongst others, during the 1950's, 1960's and 1970's crimes committed by young offenders were petty offences and was basically committed out of mischief or under poverty and with no criminal intent or *mens rea* as such. Accordingly, it was only appropriate under the prevailing circumstances then that custodial sentence be spared and the young offenders be treated leniently by imposing a fine or be sent to rehabilitation centers or be bound over so as to give them a chance to reform and eventually become useful citizens of the country. A particular criminal may be so induced only by a deterrent sentence or a long term of imprisonment. Another may well profit by being given a second chance (see *Lim Yoon Fah v. PP* [1971] 1 MLJ 37). In *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158, His Lordship Edgar Joseph Jr J (as he then was) said:

> ... the fact that the accused may be a youth, a first offender and has pleaded guilty, whilst relevant in considering the sentence to be imposed, must perforce yield to the public interest in ensuring deterrance and prevention.

However, unfortunately the present trend and the nature of offences committed by young offenders has worsened. This court cannot shut its eyes to the obvious which are brought to the attention of the court that young offenders are indulged in committing serious crimes and some young persons are even made use as couriers to carry dangerous drugs. There are too many serious crimes involving violence committed by young offenders and this trend could be a kind of *modus operandi* used by adult criminals probably with the hope that the young offenders will be spared as innocent agents the custodial sentence by the courts and the authorities should not fall into this trap or hood winked. The court must show its abhorrence and this could only be shown by reflecting on the sentence imposed by the court.

This court is of the view that in order for the courts to function effectively and not to shirk its duties the court must act without fear or favour and not to be disturbed by public perception on the decision or sentence delivered or

imposed. In *Theresa Lim Chin Chin & Ors v. Inspector General Of Police* [1988] 1 MLJ 293 at p. 298, His Lordship Salleh Abas LP said:

> ... the law is clear, despite the fact that it is much criticized both at home and abroad, our decision cannot be otherwise ...
>
> We made this observation because **we feel that we owe a duty to the public to put our position on record in view of so many adverse comments made against us**. (emphasis added)

It must be observed that every sentence passed by the court or a trial court is based on the nature of the offence, the evidence adduced on behalf of the prosecution and the defence, the facts presented by the prosecution, the circumstances in which the offence was committed whether with or without violence, provocation if any, the age, character, antecedents, the background of the offender, the plea in mitigation and the views given by the prosecution. This court is of the view that the power to impose sentence is a judicial discretion and unless and until the lower courts had erred in principle or that the sentence was manifestly excessive or manifestly low or upon considering the particular facts of the case, the High Court sitting in an appellate capacity ought not to disturb or interfere with that discretion just for the sake of pleasing public views. The sentence passed by the court must not only appear to be a judicial pronouncement but seen to be one.

In the instant appeal, this court is of the view that the learned Sessions Court judge had exercised her discretion correctly by taking into account the overall facts of the case, the nature of the offence, the circumstances in which it was committed that there was no provocation, the nature of the injuries inflicted on the victim, that the appellant had pleaded guilty, the age, the background of the appellant, the probation report and the mitigating factors and balanced them with the public interest. The appellant in this case was 20 years and 5 months old at the time of the commission of the offence. He also worked as a lorry attendant.

One observation this court would like to record is the duty of counsels representing the appellants in particular where the appeal relates to the issue of sentence to advance all relevant and sufficient grounds to assist the court to arrive and impose an appropriate sentence under the circumstances of the case. Counsels should not treat this duty lightly and in all cases must be prepared to undertake this duty vigorously so that there would be a proper balance exercised by the court to determine the appropriate sentence to be imposed against the accused. Further, on appeal, in the instant case, the learned counsel for the appellant did not advance any sufficient grounds in his plea in mitigation, worse still he did not submit to the court whether the appellant was remorseful apart from merely stressing that since the appellant was a first

and youthful offender, he should be spared the custodial sentence. On the contrary, the learned counsel for the appellant, with respect had contradicted himself by proposing that a sentence of imprisonment up to three months would be most appropriate and sufficient in the instant appeal. "A man shall not be allowed to blow hot and cold – to affirm at one time and deny at another …" (per Wilde B, in *Cave v. Mills* 7H & N HNN 913 at p. 727).

In conclusion, this court is of the view that the facts presented by the prosecution as contained in the Record of Appeal and the severity of the offence committed by the appellant outweighs the plea in mitigation advanced by counsel for the appellant (see *Ang Chai Eng v. PP* [2000] 1 CLJ 213). Accordingly, this court does not wish to interfere on the sentence passed by the learned Sessions Court judge.

In the circumstances, the appeal by the accused against the sentence is dismissed.